(8)

No. 89-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of The State Of Nevada

BRIEF *AMICUS CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSN. AMERICAN SOCIETY OF NEWSPAPER EDITORS DONREY, INC. GANNETT CO., INC. NATIONAL ASSOCIATION OF BROADCASTERS RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS THE COPLEY PRESS, INC. THE NEW YORK TIMES COMPANY THE SOCIETY FOR PROFESSIONAL JOURNALISTS THOMSON NEWSPAPERS HOLDINGS INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the First Amendment's speech and press clauses limit the power of a state to punish a lawyer who holds a news conference decrying criminal charges against his client and expressing his views regarding police and prosecutorial conduct, when there were no circumstances to suggest that the conference could interfere with the fair trial rights of the defendant or the administration of justice.

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association, The American Society of Newspaper Editors, Donrey, Inc., Gannett Co., Inc., The National Association of Broadcasters (NAB), Radio-Television News Directors Association (RTNDA), The Reporters Committee for Freedom of the Press, The Copley Press, Inc., The New York Times Company, The Society for Professional Journalists, and Thomson Newspapers Holdings Inc., submit this brief *amici curiae* in support of the Petitioner, Dominic P. Gentile. Both parties to this suit have given *amici* written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTERESTS OF THE AMICI

The American Newspaper Publishers Association is a nonprofit trade association representing about 1,400 newspapers. Membership constitutes about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States. ANPA member newspapers always have had an intense interest in providing accurate and balanced reports on matters of public significance, especially those matters concerning our criminal justice system.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 900 people who hold positions as directing editors of daily newspapers throughout the United States. ASNE's Statement of Principles sets forth, among other concepts, "The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them

to make judgments on issues of the time." Further set forth in the Statement of Principles is the following:

> Every effort must be made to assure the news content is accurate, free from bias and in context, and that all sides are presented fairly.

Readership surveys have consistently illustrated the public's interest in the operations of the criminal justice system in the United States and, pursuant to the ASNE Statement of Principles, the editor members make every effort to provide balanced coverage of the criminal justice system.

Donrey, Inc., through subsidiary corporations, d/b/a Donrey Media Group, publishes 55 daily newspapers, and owns five cable television companies and one television station. It operates in 20 states.

Within the State of Nevada, Donrey owns and operates the *Review-Journal* in Las Vegas, the *Nevada Appeal* in Carson City, and the *Daily Times* in Ely. Those newspapers have a combined circulation of over 160,000 on a daily basis. Through a joint operating agreement, the *Review-Journal* prints and distributes the *Las Vegas Sun*. The *Review-Journal* and *Las Vegas Sun* have a combined Sunday circulation in excess of 200,000. Donrey's television station, KOLO-TV in Reno, has been consistently ranked No. 1 in its market for news coverage.

A recent readership survey conducted by Belden & Associates for the Las Vegas *Review-Journal* showed that news reports concerning the criminal justice system are of significant interest to its readers. Unnecessary restrictions on comments by attorneys

practicing in Nevada would have a serious, detrimental effect on Donrey's ability to present a full and complete report on those matters to its readers and viewers.

Gannett Co., Inc., a Delaware corporation, publishes 82 daily newspapers, including the Reno *Gazette-Journal* and USA TODAY, and a variety of non-daily publications. Gannett also owns 10 television stations and 15 radio stations and operates a national wire service. Gannett's newspapers and broadcast stations routinely report on the workings of the criminal justice system. Unwarranted restriction of the gathering and dissemination of such news inhibits Gannett's ability to inform the public fully.

The National Association of Broadcasters (NAB) is a non-profit incorporated trade association that represents American radio and television broadcasters and the major commercial networks. NAB's members cover, produce and deliver the news to the American people. NAB has a heightened interest in enhancing the ability of its members to provide the American people with complete news coverage of the events in the criminal justice systems of this country.

Radio-Television News Directors Association (RTNDA) is the principal professional organization of journalists—executives, editors, reporters and others—who gather and disseminate news and other information on radio and television in the United States. RTNDA members daily report on criminal trials and other news pertaining to the administration of criminal justice in this country.

Reporters Committee for Freedom of the Press is an unincorporated association of working reporters

and news editors dedicated to protecting the First Amendment and freedom of information interests of the news media. It has provided research, guidance or representation in virtually every major press freedoms case since its founding in 1970.

On an almost daily basis, the Reporters Committee's staff attorneys and fellows assist journalists and their lawyers in solving problems arising from coverage of the criminal justice and criminal judicial systems. Callers frequently seek advice on obtaining criminal justice records under state and federal open records laws, obtaining access to judicial proceedings under the First Amendment, and challenging restrictions on what they may report or what sources, including criminal defense lawyers, may tell them.

The Copley Press, Inc. publishes five daily newspers in California—*The San Diego Union, San Diego Tribune, The Daily Breeze, The News-Pilot and The Outlook*—whose combined circulation exceeds 500,000 copies daily, as well as seven daily newspapers in Illinois, and operates an international news service.

The New York Times Company publishes 33 newspapers, including *The New York Times*, a daily newspaper with national circulation of 1.15 million daily and Sunday circulation of over 1.7 million. The Company also publishes 17 magazines and owns five television and two radio stations. Times Company publications report extensively on the criminal justice system nationwide.

Thomson Newspapers Holdings Inc., a Delaware corporation with headquarters located in Des Plaines, Illinois, publishes 123 daily newspapers and 34 weekly newspapers in the United States. These newspapers

are located in "small-town America," with the largest circulation being 80,000 and the majority of newspapers falling in the 15,000 to 25,000 circulation range. Total daily circulation in the United States within the Thomson group is 2,200,000. The experience of our editors and reporters, based on a very close interaction with their small communities, is that public interest in news about the criminal justice system is consistently among the highest of all the categories of news. In order to properly and accurately satisfy this widespread public interest in the criminal justice system, it is essential that news-gatherers talk to the participants in the system, including police, court officials and attorneys.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Nevada Supreme Court Rule 177, in pertinent part, is set out in the margin below.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case presented in the Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT*

Rule 177 deprives the public of vital information and opinion about the operation and integrity of the criminal justice system. It does this by threatening sanctions against defense attorneys who speak to reporters in order to respond to police and prosecution claims or to give their opinions about the operation of these agencies. The Rule assumes that the mention of certain topics will, *per se*, create an impermissible prejudice, even when public discussion will serve to restore a balance in the pool of information available to citizens. Under the circumstances in this case, no serious and imminent threat is presented to the defendant's right to a fair trial or to the fair administration of justice. The Rule is unconstitutional as written and as enforced and should be overturned.

ARGUMENT

I. RULE 177 DEPRIVES THE PUBLIC OF VITAL INFORMATION AND OPINION REGARDING THE OPERATION AND INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

The considerations in this case should not be confined to Petitioner's First Amendment right of speech. This case is necessarily about the ways that the public, through the news media, can hear about and understand what happens in a criminal case—an interest

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* Counsel of Record acknowledges with gratitude the research assistance provided by the head of the Washington and Lee Journalism and Communications Department, Hampden H. Smith, III, by Washington and Lee law student David M. Giles, and by Thomas M. Beck, a law student at the University of Virginia, who worked under the direction of the Thomas Jefferson Center for the Protection of Free Expression

this Court has held to be of fundamental constitutional importance. "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).[1]

The role of explaining how the criminal justice system is handling a particular case falls, for the most part, to the news media. "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). When this Court recognized

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[1] In the context of access to judicial proceedings this Court has long believed that "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 270-271 (1948). This vital public policy safeguarded by the First Amendment has been emphasized by this Court in a series of cases protecting the publicity of and public access to the criminal justice system. *See, e.g., Richmond Newspapers* (the First Amendment demands that criminal trials be open); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982) (a state statute requiring closure of trials during the testimony of minor victims of sexual offenses violates the First Amendment); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (guarantee of openness applies to the selection of jurors); *Waller v. Georgia*, 467 U.S. 39 (1984) (guarantee of openness applies to suppression hearings); *Press Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (guarantee of openness applies to preliminary hearings as well).

"a presumption of openness," *Richmond Newspapers*, 448 U.S. at 573, it reaffirmed the principle described 14 years earlier:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). The principle of an open criminal justice system relies on the assumption that news reporters will actively report on the process and will serve as a surrogate for the public's actual presence at each proceeding. "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Richmond Newspapers*, 448 U.S. at 572-3.

The accuracy and depth of understanding of that news coverage depends on the reporter's ability to attend proceedings, to read the records, and to question the participants, including the lawyers. Some facts of any particular case will be, or should be, available from police, prosecution or court records, but the full meaning of entries or the defense per-

spective may not always be apparent, even to the most practiced courthouse reporter. Attorneys involved in the litigation are able to explain the technical issues inherent in police conduct, prosecutorial decisions, defense choices, and the judicial oversight of the entire area. Swift, *Model Rule 3.6, An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U.L. Rev. 1003, 1013 (1984). "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975).

As this case illustrates, the defense attorney may be the best source of valuable opinions about and criticism of that process. No one can speak more authoritatively about the frailties of the judicial and prosecutorial systems. The freedom to speak up critically is especially important in cases like the present one involving allegations of police misconduct. "The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." *Waller v. Georgia*, 467 U.S. at 47. "[C]ommentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern." *Nebraska Press*, 427 U.S. at 606 (Brennan, J., concurring). Genuine advancement of public understanding and effective prompting of the "crucial prophylactic aspects of the administration of justice"[2] will not come about if reporters' sources are

[2] *Richmond Newspapers*, 448 U.S. at 571.

silenced by the threat of professional discipline. Speech delayed until the end of a case is tantamount to public oversight delayed until there is little left to oversee.[3] *See*, Freedman & Starwood, *Prior Re-*

[3] Especially because of the curative effect of public oversight of the criminal justice system, it is important to consider the public's right to receive the information intended for it. Ironically, the Nevada Supreme Court believed this speech ought to be suppressed precisely because it was delivered at a time when the public was keen to hear it, "a time when the intensity of public interest in a notorious case [was] at its peak." *Gentile v. State Bar of Nevada*, 787 P.2d 386, 387 (Nev. 1990).

This Court has discussed the public's right to receive in a number of other settings. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 759 (1972); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.*

Justice Brennan has explained the reasons to consider the citizen's right to receive information. "First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them." *Board of Education v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (emphasis is the Court's). Secondly, Justice Brennan believed the recipient's meaningful exercise of his own rights depends upon his receiving the speech of others. *Id.* Writing in a dissenting opinion in *Pico*, then Justice Rehnquist agreed with Justice Brennan "that the reciprocal nature of the right to receive information" comes from the recipient's own "rights of speech, press and political freedom." *Id.* at 912-13. He added, however, that he would limit the protection of the right to receive to instances when the sender's right to speak is protected and the denial of access to the information is "relatively complete."

As Petitioner has explained in his brief on the merits, the

straints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan. L. Rev. 607, 612 (1977). The need for public discussion of a case and the exchange of opinions about its progress cannot be suspended while that case is pending. *Press Enterprise II*, 478 U.S. at 12-13.

In today's high-technology society, the public knows more quickly than ever about the arrests and indictments of criminal defendants. Immediately citizens want to have information that will help them prevent similar crimes from happening to them. Next, they want information designed to catch the criminal, and they want progress reports from the police on the investigation of the crime. They want to see the progress of the prosecution, and eventually, the conviction of the guilty person.[4]

First Amendment does protect his right to speak and when he is disciplined if he speaks, the denial of access is "relatively complete." During the critical time preceding the trial and while the trial is proceeding, the defendant's attorney's speech is sharply curtailed. For the reasons set out herein, this attorney may be the only source of the critical information at the time when the public is paying the most attention. "Some news can be delayed and most commentary can even more readily be delayed without serious injury. . . . But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter." *Nebraska Press*, 427 U.S. at 560.

[4] In a survey conducted on behalf of the Las Vegas *Review-Journal* by Belden & Associates during May through July of 1988, the survey reported that 55% of the adults responding said that they were "very interested" in Crime and Police News. Even higher percentages reported great interest in "Clark County or Las Vegas News" (75%) and "Local Community or Town Coverage" (69%), topics that may include news of local crimes. The response "very interested" was the highest degree of interest offered among the survey choices.

The first information demanded is from the government's side and is, necessarily, adverse to the defense.

> The charge or indictment presents information tending toward guilt. The knowledge in the community that the police, the committing magistrate, the grand jury and the prosecutor all have concluded that there is adequate evidence of guilt to support an exercise of their judgment adverse to the defendant has an effect upon the community's view of the case.

Swift, *Restraints on Defense Publicity in Criminal Cases*, 64 Utah L. Rev. 45, 77 (1984).

Petitioner's news conference provided a counter to the police statements. It is ironic that the Nevada Supreme Court concluded that his attempt to respond, and to restore balance to the pool of information available to the public, would be substantially likely to create material prejudice to the upcoming trial. The avoidance of "material prejudice" was precisely what prompted Petitioner's difficult decision to proceed with the news conference.

The police investigation leading up to his client's indictment had been the subject of intense public interest and had raised a number of troubling questions. Someone had stolen money and drugs stored by the Las Vegas METRO police squad at a safety vault company owned by Petitioner's client, Grady Sanders. The theft was discovered on the last day of January

1987. Almost immediately, the Sheriff told reporters that employees of the vault company were among the suspects, (Las Vegas *Review-Journal*, February 2, 1987, 1A; *Las Vegas Sun*, February 3, 1987, 1B.), but one newspaper had reported that METRO police officers were suspected of the burglary (Las Vegas *Review-Journal*, February 4, 1987, 8B). Shortly thereafter, it was reported that the FBI had joined the investigation (Las Vegas *Review-Journal*, February 4, 1987, 1B). By mid-February, barely two weeks after the burglary had been discovered, the Sheriff announced that the police officers had been cleared. (*Las Vegas Sun*, February 12, 1987). In March, a police detective filed an affidavit in court swearing that the purpose of the theft was to discredit the local police drug investigation team. (Las Vegas *Review-Journal*, March 12, 1987, 1B). Then, it was reported in June of 1987 that Grady Sanders had been involved in an undercover FBI sting and the suggestion made that Sanders had a "warm relationship" with the FBI as an informant (*Las Vegas Sun*, January 28, 1988, 5B). In a column published on January 7, 1988, in the *Las Vegas Sun*, the writer raised a string of questions about the FBI's arrest of the polygraph operator who tested and "cleared" the local police officers who had been mentioned as suspects in the vault theft. Before Petitioner said so explicitly at his news conference, news stories and columns suggested that Grady Sanders was not the only likely suspect in the burglary and that internecine quarreling between police agencies might have produced the indictment against him. Mr. Sanders' indictment for burglarizing the police safety vault was announced by the police on February 5, 1988 (*Las Vegas Sun*, February 6, 1988, 1A; Las Vegas *Review Journal*, February 7, 1988).

The situation demanded a reply from the defense; certainly reporters looked to the defense for a reply. It is not sufficient to say that the defendant himself could answer reporters' questions. In this case, Grady Sanders had made tentative responses to police activity (*Las Vegas Sun*, undated story, "Burglarized vault firm closes doors"), but many criminal defendants may be intimidated or inarticulate, and may not be able to speak for themselves. *Powell v. Alabama*, 287 U.S. 55, 68-70 (1932). The defendant may not know whether a protest against the system is timely, accurate or likely to be effective. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). It is the most appropriate spokesperson, the defendant's lawyer, whom Rule 177 proposes to silence.

> Defense counsel should not be prevented from conveying to the public the essentials of a client's position with respect to an investigation or the filing of charges. There are times when counsel for a controversial defendant can legitimately speak in support of his client's cause by discussing the propriety of the processes by which his client has been charged and is being tried.

Swift, *Restraints on Defense Publicity in Criminal Cases*, *supra*, at 81.

The Petitioner's news conference was held precisely for the purpose of responding to the indictment of his client and to articulate his response to the troubling implications raised by the indictment. At the

very least, protestations of innocence ought to be permitted. Indeed in some cases, citizens may believe that the absence of protest raises the implication of guilt. But in this case, the Petitioner also believed that the government had misused its power.

Certain prosecutions will compel the public's interest and restrictions on publicity about these cases will do nothing to diminish that interest—indeed it will likely fan the interest to greater heights. The best cure for these dilemmas is accurate on-the-record information.[5] To silence the attorneys involved in a criminal prosecution works against the effort to obtain balanced and accurate information.

II. THE SPEECH OF DEFENSE COUNSEL DID NOT PRESENT A SERIOUS AND IMMINENT THREAT TO THE TRIAL PROCESS

A. No Threat Was Presented To The Defendant's Sixth Amendment Rights To A Fair Trial

If speech about the criminal justice system is to be restrained, the Court's analysis of any prior restraint of protected speech searches for "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable, it must immediately imperil." *Craig v. Harney*, 331 U.S. 367, 376 (1947).[6] Rule 177 does not permit the application of the proper clear and present danger test. It merely creates a list of presumptions.

[5] Without accurate information, rumors will almost surely fill the gap. "The muzzling of responsible sources of information creates a vacuum that will be filled by irresponsible sources." Younger, *Fair Trial Free Press and the Man in the Middle*, 56 A.B.A. J. 127, 128 (1970). Rumors, fed by a void of information, "could well be more damaging than reasonably accurate news accounts." *Nebraska Press*, 427 U.S. at 567.

[6] Because Petitioner and other amici have addressed the applicable standard, this brief does not.

Rule 177 (2)[7] has four subparts that create a presumption that the mention of many topics listed will[8]

[7] 1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:

a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

. . .

c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that would result in incarceration;

e. information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

[8] Actually the Rule says these topics are "ordinarily . . . likely to have such an effect." Especially after the decision by the Supreme Court of Nevada in this case, the words "ordinarily . . . likely" are turned into a presumption that mention of these topics *will* create a material prejudice.

create the substantial likelihood of material prejudice. Two of several topics listed are protestations of the defendant's innocence and the credibility of any witness.

Petitioner's speech offended Rule 177 merely because Petitioner's news conference spoke about these topics listed in the subparts of the Rule. When Petitioner mentioned topics on the Rule 177 list, he did so to respond to the police and prosecution, who had already discussed those topics. Petitioner did not create publicity adverse to his client's right to a fair trial. He did not create publicity that would unfairly affect the administration of justice. Because the Rule uses the substantial likelihood standard and couples it with an "all-purpose" list of presumptions, it permits the Supreme Court of Nevada to restrain speech under circumstances that do not present the requisite threat to conduct of the criminal trial.

Nevada Supreme Court Rule 177 and the American Bar Association model rule[9] from which it is derived, are products of an era of one-sided fixation on publicity adverse to the defense.[10] The literature spawned by the trial of Sam Sheppard almost uniformly failed to consider what should occur when the defendants provided *their* side of the news story. *See, e.g.*, Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 Wm. and Mary L. Rev. 1 (1971); Kaufman, Report to the Judicial Conference

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[9] ABA *Model Rules of Professional Conduct* Rule 3.6 (1983).

[10] "The original 1968 edition of the Fair Trial and Free Press Standards relied almost entirely on *Sheppard v. Maxwell*." American Bar Association, *Standing Comm. on Association Standards for Criminal Justice, 1986 Report* § 8.3S (1986).

of the United States, *The Free Press-Fair Trial Issue*, 45 F.R.D. 391 (1968); Jaffe, *Trial by Newspaper*, 40 N.Y.U. L. Rev. 504 (1965).

Certainly the courts have recognized the prejudicial danger in attorneys' remarks during some cases, but this Court has concluded: "In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right." *Nebraska Press*, 427 U.S. at 551. Research published within a year after this decision confirmed this judgment with data showing that:

> Jurors take their responsibility seriously; they check prejudices at the door of the jury room and recognize their special role as temporary members of the judiciary bound by rules of law and procedures that are foreign to their business transactions or informal conversations. Ordinary citizens are willing to accept these legal trappings and to work within them. The fears voiced by critics that jurors make capricious decisions because of bias, incompetence and irrelevant factors have not been substantiated.

Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 Stan. L. Rev. 515, 520 (1977). A more recent survey of the literature confirmed the same conclusion ten years later. Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 Judicature 162 (1988).

In 1978, the American Bar Association House of Delegates recognized that danger is not present in every criminal case and adopted the "clear and pres-

ent danger" standard in the Fair Trial Free Press Rule 8-1.1 on Extrajudicial Statements.

> Indeed, in the vast majority of criminal cases, extrajudicial statements by trial attorneys have no impact at all. The failure to take full account of this consideration is the central weakness of the [earlier trial publicity rules].

American Bar Association, *Fair Trial and Free Press Standards*, Comment to Section 8-1.1 (1978).

More recently, comment [1] to Rule 3.€ of the *District of Columbia Rules of Professional Conduct*, explained why it continues to use the "serious and imminent threat" standard:

> It is difficult to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to influence the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. *Often a lawyer involved in the litigation is in the best position to assist in furthering these legitimate objectives.* No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. (Emphasis added.)

Rules of Professional Conduct and Related Comments, D.C. Court of Appeals, Bar Report Supplement, p. 37 (February/March 1990).

At this year's most recent ABA meeting, the House of Delegates adopted several revisions to the Fair Trial Free Press Standard 8-1.1 regarding Extrajudicial Statements. Though the revisions by no means represent an ABA consensus on this issue, the ABA adopted a test which "at least 'approximated' the clear-and-present danger standard," according to the informal remarks provided by the revision committee reporter. Bender, *Report With Recommendations - Fair Trial and Free Press Standards, ABA Criminal Justice Section*, commentary at 10 (1990). Additional action by the House of Delegates acknowledged in a limited fashion that the defendant may reply to the prosecution's statements; it required the prosecution to acknowledge the presumption of innocence, *id.* at 6, and it added new language to acknowledge that the attorney may "educate or inform the public concerning the operations of the criminal justice system," *id.* at 7. Unfortunately the ABA model rule retains the chilling superstructure of the list of inhibited statements. Even so, these changes reflect some recognition that a defense reply to reports from police and prosecution agencies will not bias a fair trial.

Especially when that reply espouses the defendant's position, does so in response to reported events and statements made by the police, and does so six months before a trial is scheduled, there is no realistic danger of the comments creating a threat to the defendant's Sixth Amendment right to a fair trial.

B. The State's Interest In The Fair Administration Of Justice Is Not Threatened By This Speech

When the speech to be restrained is speech from the defendant's mouth or "mouthpiece," as the case may be, "the key conflict is . . . not between a

defendant's sixth amendment rights and a publisher's first amendment rights; the interests advanced to justify suppression of prejudicial news are largely the state's interests in putting guilty criminals in jail and in maintaining confidence in the fairness of the judicial system." Tribe, *American Constitutional Law*, § 12-11, n.3 (1988). At the same time that "[a]n accused has a right to a trial by an impartial jury on evidence which is legally admissible," it is also true that "[t]he public has the right to demand and expect 'fair trials designed to end in just judgments.' " *Mares v. United States*, 383 F.2d 805, 808 (10th Cir. 1967). But the government is not permitted to restrain criticism of its agencies in order to begin a criminal trial in a neutralized vacuum. "A judicial process untainted by prejudice against the prosecution is certainly a worthy goal, but that is not the point so far as the Constitution is concerned." Freedman and Starwood, *supra*, at 612. Thus, the government's interest is limited to "seeing that cases in which it believes a conviction is warranted are tried before [a jury] which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 34, 36 (1965). Even the American Bar Association's standards discussing the prosecutor's role do not insist that government has a constitutional right to convict the accused: "The duty of the prosecutor is to seek justice, not merely to convict." American Bar Association, *Standards for Criminal Justice*, Prosecution Function Standard 3-1.1 (c) (1982).

As discussed above, most of the initiatives on reports to the public regarding a criminal case are in the hands of prosecution and police. It does not threaten the state's interest in the fair administration

of justice to permit defense counsel to respond. "[R]ather than interfering with a fair trial, the right of a defendant to provide information necessary to overcome already existing biases may well be essential to its maintenance." Swift, *Restraints on Defense Publicity in Criminal Cases*, *supra* at 77.

CONCLUSION

When, as here, a fair trial and the fair administration of justice are not impaired, the public's interest in the reporting and receiving of information and opinion about the functioning and integrity of the criminal justice system should prevent the Supreme Court of Nevada from enforcing Rule 177. For the foregoing reasons, *amici curiae* urge this Court to reverse the decision of the Supreme Court of Nevada and to strike down Rule 177 as unconstitutional.

Respectfully submitted,

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